Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Transforming the 2.5 GHz Band	)	WT Docket No. 18-120

To: The Commission

COMMENTS of BRIDGE THE DIVIDE FOUNDATION, INC. and ROCKY MOUNTAIN BROADBAND, LLC

Bridge the Divide Foundation, Inc. ("BTD") and Rocky Mountain Broadband, LLC ("RMB") (collectively, "Joint Commenters"), by their attorneys and pursuant to Section 1.419 of the Commission's Rules, hereby submit the following Comments in response to the Commission's *Notice of Proposed Rulemaking*, FCC 18-59, released May 10, 2018 ("*NPRM*") which initiated the above-referenced docket. The Commission should:

- Use county boundaries, not census tracts, to rationalize existing GSAs.
- Remove the limitation on holding EBS spectrum to only non-profit entities.
- Remove the educational use obligations.
- Provide incumbent EBS licensees within a county a first-priority window to apply for additional channel blocks within that county.
- Provide a second-priority window to Tribal entities with respect to counties containing Tribal Lands.
- Provide a third-priority window to incumbent EBS spectrum lessees within a county to apply for additional channel blocks within that county.
- Allow for post-filing, pre-auction full-market settlements among mutually-exclusive applicants within a given filing window.

Joint Commenters' Interest in This Proceeding

BTD is a non-profit organization, founded with the goal of helping to bridge the digital divide between different communities – both domestically and internationally. BTD holds EBS

licenses in Alabama and Colorado, all of which are leased to commercial entities. BTD's Colorado spectrum is leased to RMB, which has been the *de facto* transfer lessee thereof since 2006.

Background

RMB was created in response to the Commission's prior reorganization of the 2.5 GHz band in 2004, when the Commission changed its rules to focus the 2.5 GHz band on the provision of broadband service, as opposed to video.[1] In addition to changing the focus of the 2.5 GHz band from video to broadband, the *BRS/EBS Order* also initiated a new rulemaking proceeding to create a framework for licensing the fallow, or "white-space", EBS spectrum – both unassigned frequency blocks within a geographic area and unassigned geographic areas.[2] The clear implication was that the Commission would begin licensing that white-space spectrum within a 5- to 7-year period (about the expected length of a rulemaking proceeding), *i.e.*, somewhere in the neighborhood of calendar year 2011.

Because in Colorado BTD is the licensee of only one channel group (the A-block), the commercial potential of a broadband network based on the Colorado spectrum was necessarily going to be limited, as that amount of spectrum would only be able to support high-speed service to a lesser number of households than would a system built with more spectrum. There was, and remains, a large amount of fallow EBS spectrum in the two Colorado markets (Aspen and Vail) where BTD holds and RMB leases the A-block spectrum.

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[1] *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) ("*BRS/EBS Order*").

[2] *Id.*, at ¶¶ 266-288.

RMB decided to build and launch a broadband network using the A-block spectrum it held, with the plan to acquire additional EBS spectrum as soon as the Commission fulfilled its promise, made in the *BRS/EBS Order,* to establish a new licensing method for EBS "white spaces". RMB did launch, and built up a business under the "Peak4G" trademark. However, the Commission took no action in its white-spaces rulemaking, and continued its freeze on the licensing of unassigned spectrum. Thus, RMB had no ability to expand or to implement the increasingly high service speeds demanded by the public as internet usage evolved over time. As a result, RMB was forced to shutter its commercial operations in 2012.[3]

Similarly, BTD is limited in what it can offer to local schools in terms of assistance with bridging the digital divide, so long as BTD holds only a single spectrum block. BTD, above all, needs for the current freeze to end, so that BTD can obtain more spectrum in its current licensed areas and expand its abilities to serve.

DISCUSSION

I. Rationalization of Incumbent EBS GSAs; Use County Boundaries to Rationalize Current EBS Holdings

In the *NPRM*, at ¶¶ 11-18, the Commission asks whether it would be better to rationalize existing EBS licenses in the A, B, C, D & G-blocks by expanding them out to cover all partially-covered census tracts, or partially-covered counties. Joint Commenters believe the only workable arrangement is to use counties, as opposed to census tracts. Census tracts are simply too small to be usable for the purpose of spectrum licensing.

[3] RMB later subleased some of the spectrum in Aspen and Vail, Colorado, first to San Isabel Telecom, and later to Futurum Communications, which acquired San Isabel. Futurum's operations pursuant to the sublease continue, at least for the time being. But Futurum, like RMB before it, will be constrained in its ability to continue to provide high-speed service as it increases its subscriber base – unless RMB can increase the amount of spectrum available to sublet by accessing the unassigned spectrum blocks in Aspen and Vail.

A single broadband base station designed to provide fixed service will almost always cover multiple census tracts. Moreover, to create and implement marketing and customer service programs for areas as small as census tracts is infeasible and economically wasteful. Using census tracts instead of counties destroys any potential for economies of scale, and raises costs for users. From an engineering standpoint, having different licensees of a single spectrum block for each census tract would be a nightmare in terms of frequency coordination.

For a school system or other educational institution with multiple facilities spread within a county across several census tracts, a county-wide license is essential. It would be difficult, if not impossible, for an educational institution to obtain appropriations funding for a system to cover only some but not all of its schools; similarly, it would be difficult if not impossible for such an institution to attract a commercial lessee for such a small area.

The Commission has never before licensed spectrum using areas as small as census tracts, for all the reasons set forth above. The only time the Commission has utilized census tracts is for reverse auctions, where the Commission is trying to narrowly target areas that are unserved, without simultaneously subsidizing redundant builds in areas that already have service. Such a narrowly targeted approach makes sense for that special purpose, but it makes no sense in the context of designing the infrastructure for a communications network.

In sum, the Commission should use counties as the geographic area for rationalizing incumbent EBS spectrum.[4]

[4] Where there is more than one incumbent GSA on a particular channel block in a particular county, then the incumbents would each expand outward from their existing GSAs and split-the-football, with the line created by their (expanded area) intersection being extended from one end of the county to the other (*i.e.*, beyond the edges of the circles). This is workable, equitable, and most importantly, can be implemented by Commission staff by updating ULS, without the incumbents having to file any new applications. (Joint Commenters strongly support

II. The Proposed Flexibility for EBS Licensees Is in the Public Interest

A. The Limitation on Eligibility Should Be Removed

The *NPRM*, at ¶¶ 20-22, proposes to eliminate the current eligibility restriction that limits EBS license eligibility to non-profit or governmental institutions. This is sound public policy – the current restrictions on eligibility have hindered the ability to attract capital for decades. Originally, the E- and F-blocks were allocated exclusively to non-profits along with the other channel blocks. In the rulemaking proceeding that created "MMDS" out of those two blocks, numerous commenters pointed out that the (then) ITFS spectrum was lying fallow and unused, and that leaving such a huge swath of spectrum so fallow was contrary to the public interest. What was true then is even more true today, some 30-odd years later. This spectrum needs to be put to its highest and best use, and the only way to do that is to remove the eligibility restrictions.

Removing the eligibility restriction is in the best interest of incumbent EBS licensees as well as the public. Under the current regime, an EBS licensee must retain some usage of the spectrum for itself or other local educational institutions, even if the licensee could better use the value of the spectrum to serve other needs (for example, to pay for a new science laboratory). Allowing incumbents to sell or assign their licenses is a vastly more efficient mechanism for monetizing the value of their spectrum than is the current spectrum leasing regime.

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a solution where Commission staff can update ULS without the filing of new applications by incumbent licensees.)

In this regard, spectrum leases which now cover 100% of the GSA of an incumbent EBS license should also automatically be updated in ULS to cover the expanded GSA of that license, without the need to file a new spectrum lease application. In the rare case of a spectrum lease agreement where the lessee is not automatically entitled to lease the expanded GSA, those parties can file to reduce the area being leased – it is more workable to process one or two such reduction applications than to process dozens or hundreds of applications to conform a pre-existing lease to the expanded GSA.

B. The Requirement of Educational Use Also Should Be Eliminated

Of course, it makes no sense to allow a commercial operator to receive an EBS license via assignment and then be laden with the current restrictions on use of the spectrum. Doing so would run counter to the reason for allowing such commercial-entity-eligibility in the first place. In those instances where the educator is best served by retaining some use of the spectrum, or by obtaining a certain number of free high-speed subscriptions for its teachers and students, it is easy enough for that educator to negotiate that provision into the contract it makes with a commercial entity. Where the educator can derive more value by obtaining something else from the commercial entity, the educator should have the flexibility to negotiate to wring out the maximum value for itself under the circumstances of the case.

III. White-Space Priority for Incumbent Licensees Is Necessary

A. Incumbents Deserve a First Chance for Unassigned Blocks in Their GSA

As has happened to the Joint Commenters, the current filing freeze, lasting for an entire generation, has frustrated even the soundest of business plans. Those who relied on the implicit Commission promise to license the existing white spaces within the foreseeable future should have the first chance to realize their long-delayed plans. Therefore, the Commission should begin the licensing of remaining EBS white spaces by opening a window open only to existing incumbent EBS licensees, and only for seeking additional channel blocks within their newly-expanded (*see* discussion on Part I, *supra*) incumbent GSAs, so as to enable them to aggregate a sufficient depth of spectrum to achieve the high service speeds demanded for the 21st century. The incumbent EBS licensees will need this additional spectrum depth whether they intend to operate themselves, to lease a portion of their spectrum, or to have something of value to assign to a commercial entity.

For this window, to repeat, "local" should be a function of who holds the already-licensed EBS spectrum in that particular geographic area, not where the entity is headquartered. It would be irrational to punish the few non-profit entities, such as HITN, Clarendon Foundation, or BTD, that paved the way for what limited use has been made of EBS spectrum over the past decades, in favor of some entity which has done nothing in this field.

If the Commission is concerned about an incumbent aggregating "too much" EBS spectrum within its GSA, then Commission could limit the number of additional spectrum blocks an incumbent may acquire via this initial window. For example, the Commission could set a limit at two additional spectrum blocks, or say that an incumbent could hold no more than four of the six EBS channel blocks (including any blocks it holds within that area prior to the window). But "local" must be defined by reference to whether the involved non-profit already holds other EBS spectrum in the same geographic area, not where it puts its headquarters.[5]

B. A Second Window for Tribal Entities Is Acceptable if Properly Defined

Joint Commenters have no objection to a second priority window, limited to those counties still containing white space after: a) the expansion of incumbent licenses to county lines, and b) the first priority window, for Tribal entities. However, such a second window also should be limited to those remaining white spaces that contain at least one Tribal area. Where there is such a county, the Tribal entity should be allowed to apply for the involved channel block for the entire remaining white space within that county, even if the Tribal area only covers a portion of the white space on that channel block in that county. The involved Tribal entity will need enough geographic area to make its potential system viable, and that would mean including

[5] Joint Commenters agree with the Commission's proposal, *NPRM*, at ¶ 33, to limit the definition of "local" to entities that were the licensee of record of a particular call sign as of the adoption date of the *NPRM*.

the remaining white space in the county on that block. Again, that is so whether the Tribal entity intends to build itself or to monetize the spectrum to address other Tribal needs.

C. The Third Priority Window Should Be for Incumbent Spectrum Lessees

As to any remaining white spaces after the expansion of incumbent GSAs and the first two priority windows, that third window should be limited to existing incumbent spectrum lessees within the county. It should not be for complete newcomers to the industry. Existing local non-profits have had decades – indeed, since the 1970s -- within which to apply for this spectrum if they had any legitimate interest or need. Even after imposing a filing freeze on other entities, the Commission has granted every single one of the numerous EBS waiver applications filed by local institutions seeking to launch a system immediately.

Enough is enough! In contrast to non-licensee entities, commercial entities that already have leased this spectrum in a specific county have demonstrated a desire and intention to make use of the spectrum and build something to serve the public. It is they who deserve a priority window.[6]

D. Only Timely-Filed Applications Can Be Eligible to Bid at Auction

The *NPRM*, ¶ 45, asks about how to resolve mutually-exclusive applications within a given priority window. The whole point of a priority window is to afford priority; therefore, any mutual exclusivity must be resolved by conducting an auction ***limited to those entities that timely filed and are mutually exclusive.*** The mere existence of mutually exclusivity within a window provides no basis whatsoever for re-opening a window to receive additional

[6] As with incumbent EBS licensees and the first priority window, eligibility for this third window should be limited to those entities that already held a spectrum lease authorization for the involved county as of the adoption date of the *NPRM*.

applications. If someone either did not have enough interest to file during the initial window, or was not eligible during that initial window, that someone has no right to participate.

Rather, upon a determination that there is mutual exclusivity in a given county, the Commission should announce the identities of the mutually exclusive entities for that county, and a deadline, at least thirty days away, for the filing of short-form applications by those entities. The Commission should also allow those entities to negotiate a full-market settlement during the period before the short-form filing deadline, in order to potentially eliminate the need to conduct an auction at all for that county.

Parties to a full-market settlement should be allowed to negotiate any reasonable solution to reach a settlement, without regard to the Commission's so-called "anti-greenmail" rule. *See* 47 CFR § 1.935. Parties may well decide to split the remaining white-space within the county on the involved channel block, or have one party obtain the white space for one channel block while the other party obtains the white space for another channel block within the county, or for one party to obtain the additional spectrum in one county while the other party obtains the additional spectrum for another county. In many instances, the spectrum one party obtains by negotiation will be more valuable than what another party obtains; in such cases, cash equalizers based on spectrum value (as opposed to out-of-pocket expenses) are appropriate. Under such circumstances, employing an "anti-greenmail" rule would inhibit efficient rationalization and be contrary to the public interest. It has already been eighteen years since the filing freeze imposed by the *BRS/EBS Order*. The public interest requires prompt resolution of the licensing and rationalization of this fallow spectrum.

Therefore, wherever all mutually-exclusive parties jointly file a notice of full market settlement prior to the short-form filing deadline, the Commission should cancel the auction for

that spectrum and afford the parties another thirty days within which to amend or dismiss their respective window applications to reflect their settlement. Such settlement amendments should be treated as minor amendments, and the amended applications processed as being not mutually exclusive. This process will expedite the delivery of broadband to rural America using EBS spectrum.[7]

CONCLUSION

The Commission should rationalize existing GSAs using county boundaries. This should be an automatic process, whereby the Commission staff simply update the incumbent EBS licenses in ULS to reflect their expanded licensed service areas. Once that is done, the Commission should open a first-priority filing window for existing EBS licensees within a county to obtain additional channel blocks within that county. Once those applications have been processed, the Commission should open a second-priority filing window for Tribal entities to file for remaining white space in counties where the involved Tribe has Tribal Land. Once those applications have been processed, the Commission should open a third-priority filing window for incumbent EBS spectrum lessees within a county to obtain additional channel blocks within that county.

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[7] At ¶ 44, the *NPRM* asks about mechanics of the windows. The Commission should give no more than sixty days' notice of the opening of a filing window, and then leave the window open for no more than ten business days. Any interested party will already know, from the day of the issuance of a report and order in this proceeding, to be on the look-out for a public notice announcing the opening of the filing windows, and can prepare the bulk of its application (including all exhibits to be uploaded) in advance of the public notice. There already has been too much delay in getting this spectrum into the hands of those who will put it to good use.

At ¶¶ 49-51, the *NPRM* asks about auctioning any remaining white spaces after all three priority windows. Joint Commenters are indifferent about this issue, as they believe there will be little or no remaining white spaces after all three priority windows. At that point, the Commission's focus should be on administrative convenience, as the Commission does not have unlimited personnel resources.

For each of these priority filing windows, the Commission should announce the identities of the mutually-exclusive applications in each case of mutual exclusivity, and encourage those applicants to reach full-market settlements to avoid having to conduct an auction for the spectrum in the involved county. Only where the parties fail to reach a full-market settlement should the Commission conduct an auction.

The Commission should remove the restriction on eligibility to hold EBS spectrum. For-profit entities should be allowed to hold EBS spectrum licenses directly. At the same time, the Commission should remove the requirement that the spectrum be put to educational use. Non-profit and governmental educational institutions should have the flexibility to derive the full value of their holdings in the manner that best suits their needs.

Above all, the Commission should move expeditiously to promulgate new rules and get this fallow spectrum into use. The EBS white spaces have been fallow since the 1970s, when the Commission decided to exclude commercial entities from holding the spectrum directly, and have been subject to one filing freeze or another over much of the ensuing generations. The time for pondering has come and gone. The time for action has arrived.

Respectfully submitted,
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